

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

MAUREEN O'NEILL, as Owner and as Trustee
for MAUREEN O'NEILL FAMILY TRUST,
JOHN O'NEILL, as Owner and Managing Agent;
and MARLENE O'NEILL, as Owner and
Manager,

Respondents.

DANTE LEMONS, Individually and as Guardian
ad litem, CHANEL WILLIAMS, Individually and
as Guardian ad litem, TAYANNA LEMONS, a
Minor, TALIA LEMONS, a Minor,

Complainants.

Case Nos.

H 200506 P-0523-00-h
H 200506 P-0523-01-h
H 200506 P-0523-02-h
H 200506 P-0523-03-h
H 200506 P-0523-04-h

C 06-07-102

08-08-P

DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter and designates it precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, Title 2, section 7435, subdivision (a). The Commission, *nunc pro tunc*, makes the following minor typographical corrections to the proposed decision: at page 8, line 1, "that" is deleted; at page 9, line 6, "12065" is replaced by "12965;" at page 12, line 20, "for" is deleted; and at page 17, line 18, "12897.1" is replaced by "12987.1."

Any party adversely affected by this decision may seek judicial review of the decision under Government Code sections 11523 and 12987.1, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437.

Any petition for judicial review and related papers shall be served on the Department of Fair Employment and Housing, the Commission, respondents, and complainants.

DATED: September 16, 2008

GEORGE WOOLVERTON

TAMIZA HOCKENHULL

CAROL FREEMAN

LINDA NG

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PROPOSED DECISION

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on January 22 and 23, 2008, in San Francisco, California. Gregory Fisher, Senior Staff Counsel, and Jason Cale, Staff Counsel, represented the Department of Fair Employment and Housing. Marlene O'Neill, respondent, and James O'Neill (not a party to this action), served as representatives for all respondents at hearing. Complainants Dante Lemons and Chanel Williams and respondent Maureen O'Neill attended the hearing.

After the hearing, respondents filed a Motion to Supplement the Record, which the Department of Fair Employment and Housing opposed. After the parties' appearances and argument at the telephonic hearing held on March 24, 2008, the undersigned administrative law judge denied respondents' motion. The parties subsequently filed briefs on the issue of the timeliness of the accusation, the latter of which was received by the Commission on April 14, 2008, and the case was deemed submitted on that date.

After consideration of the entire record, the Administrative Law Judge makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On February 13, 2006, complainants Dante Lemons and Chanel Williams, on their own behalf and on behalf of their minor children, Tayanna and Talia, filed a verified housing discrimination complaint with the Department of Housing and Urban Development (HUD), case number 09-06-0684-8, against Maryland Apartments, 3301 Telegraph Avenue, Oakland CA, 94609; Maureen O'Neill Trust (owner); and Marlene O'Neill (owner and manager). The complaint alleged that, during the tenancy of complainants, who are African American, at the Maryland Apartments, resident manager Marlene O'Neill, who is Caucasian, made discriminatory statements to Dante Lemons, by calling him a "do[]-rag [N-word]"¹ and saying, "You're not going to turn this place into a ghetto." The complaint alleged that, as a result, complainants moved out of their apartment, asserting that respondents had subjected them to discriminatory housing practices, in violation of Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988.²

2. On March 3, 2006, the above-referenced HUD complaint was filed with the Department of Fair Employment and Housing (DFEH or Department) and issued DFEH case numbers H 200506 P-0523-00-h and H 200506 P-0523-01.³

3. On June 15, 2006, the DFEH issued a 100-day letter, advising complainants that, pursuant to Government Code section 12981, subdivision (a), completion of the investigation and issuance of an accusation within 100 days from the filing of the complaint was impractical because the DFEH needed to subpoena documents and conduct more investigation. A copy of the 100-day letter was sent to "Maureen O'Neill, Maryland Apartments, 2594-26th Avenue, San Francisco, CA, 94116."

4. In the course of its investigative discovery in this case, the DFEH served on Maureen O'Neill and the O'Neill Family Trust a Subpoena Duces Tecum for records and documents relating to the rental property located at 3301 Telegraph Avenue, Oakland,

¹ Throughout this decision, the term "N-word" is used in place of the alleged racial epithet, as agreed by the parties at hearing.

² Because there are multiple O'Neill family members named in this case, at times for clarity this decision will refer to individual O'Neill family members by their first name. No disrespect is intended.

³ The only administrative complaint submitted as part of the Commission's records in this matter was the HUD complaint described in findings of fact one and two. There was no evidence tendered at hearing or otherwise submitted to the Commission establishing whether any amended complaints were issued, including those numbered H 200506 P-0523-02-h, H 200506 P-0523-03-h, or H 200506 P-0523-04-h, which are referenced in the accusation.

California. Maureen O'Neill did not respond or produce any documents in response to the DFEH's Subpoena Duces Tecum.

5. On January 30, 2007, the DFEH filed a Petition for Order Compelling Compliance with Investigative Discovery (Petition to Compel) against Maureen O'Neill in the Superior Court of California, County of Alameda, Case No. RG 07308666.

6. On May 23, 2007, the DFEH filed a Certificate of Partial Compliance with the Alameda County Superior Court, stating that Maureen O'Neill had provided a "partial response" to the DFEH's Subpoena Duces Tecum. The DFEH simultaneously filed a Request for Dismissal of its Petition to Compel. The Alameda County Superior Court entered the dismissal on May 23, 2007.

7. On June 21, 2007, Wanda J. Kirby, as then Interim Director of the DFEH, issued an accusation against Maureen O'Neill, as owner and trustee for the Maureen O'Neill Family Trust,⁴ John O'Neill, as owner and managing agent, and Marlene O'Neill, owner and manager (collectively, respondents), pursuant to Government Code section 12930, subdivision (h), of the Fair Employment and Housing Act (FEHA or the Act).

8. The DFEH's accusation alleged that respondents discriminated against complainants because of their race, made discriminatory statements of preference based on race, and retaliated against complainants for objecting to unlawful discrimination, in violation of Government Code section 12955, subdivisions (a), (c), and (f). The accusation also alleged that respondents violated Government Code section 12955.7, by coercing, intimidating and interfering with complainants' right to discrimination-free housing. Finally, the DFEH also alleged that respondents violated Civil Code section 51, as incorporated into FEHA at Government Code sections 12948 and 12955, subdivision (d), by denying complainants full and equal advantages and privileges in a business establishment.

9. At all times relevant, Maryland Apartments was an apartment complex located at 3301 Telegraph Avenue, Oakland, California, qualifying as a "housing accommodation" within the meaning of Government Code sections 12927, subdivision (d), and 12955, subdivisions (a) and (c).

10. In June 1995, respondent Maureen O'Neill, trustee of the O'Neill Family Trust, acquired ownership of the Maryland Apartments. During the late 1990s and in the year 2000, in a series of transactions, the O'Neill Family Trust transferred fractional ownership interests to Maureen O'Neill individually, and to her grown children, Marlene, John, James and Barbara O'Neill and Martha O'Neill Feely. At the time of the events in the accusation, respondents O'Neill Family Trust, Maureen O'Neill, Marlene O'Neill and John O'Neill

⁴ The trust entity in these proceedings is properly referred to as the O'Neill Family Trust. Maureen O'Neill, mother of Marlene, Martha, John, James and Barbara, is trustee of the O'Neill Family Trust.

qualified as “owners” within the meaning of Government Code sections 12927, subdivision (e), and 12955, subdivisions (a) and (c). Respondents were Caucasian.

11. In 2003, Marlene O’Neill became the resident manager at Maryland Apartments, occupying an apartment unit on site.

12. In October 2004, complainants Dante Lemons and his wife Chanel Williams, both African-Americans, were looking for a place to live. Lemons had recently started a new job at Home Depot. Williams worked at Collection Bureau of America as an account manager. Their daughter, Tayanna, was five years old.

13. On October 30, 2004, Chanel Williams, as tenant, and Maureen O’Neill, as owner, signed a one-year Residential Tenancy Agreement for a one-bedroom apartment located at 3301 Telegraph Avenue, Oakland. The monthly rent was \$725, payable on the first of each month. Lemons, Williams and Tayanna moved into apartment number 101 that day.

14. In November 2004, after about a month on the job at Home Depot, complainant Lemons was seriously injured in a car accident on his way home from work. As a result, he was unable to work for several months and went out on disability leave. While he tried returning to his job at Home Depot a couple of times, he had difficulty performing the carrying and lifting his job required, and he was placed back on disability leave.

15. In about the spring or early summer of 2005, Lemons was sitting on the front porch of Maryland Apartments, listening to the radio, when resident manager Marlene O’Neill came up to him and said, “There is no loitering outside.” Lemons responded, “But I’m a tenant; I live here. How can I be loitering?” Marlene then yelled at him, “You can’t be out here. You are turning this into a ghetto.” Lemons felt confused and upset. He could not understand why Marlene had spoken to him that way or why he was not allowed to be on the porch.

16. Lemons went inside to his apartment and called the police. The responding police officer gave Lemons a brochure from a fair housing group, Sentinel Fair Housing, and suggested that Lemons contact them if he had further problems. That evening, Lemons told his wife Chanel Williams that Marlene O’Neill had yelled at him for being on the stairs and that he did not understand why. Williams told him, “Just brush it off.”

17. Some time later, at Marlene O’Neill’s request, Lemons helped her clean out items from a recently-vacated apartment on the second floor of Maryland Apartments. Later that evening, Marlene banged on the door of complainants’ apartment, shouting “I know you’re in there; I know you’re in there.” When Lemons opened the door, Marlene shouted at him, accusing him of stealing items from the upstairs apartment.

18. The next day, Marlene O’Neill apologized to Lemons for accusing him of stealing. Lemons tried to “let it go,” but he was frustrated and upset, especially when he learned from

other tenants that Marlene had told them that he had been stealing. Lemons felt that Marlene's baseless accusation was demeaning and that she judged him because of his color.

19. On another occasion, Lemons was sitting on the front steps of Maryland Apartments, writing and listening to music on his radio. Marlene O'Neill came from across the street, glaring at Lemons. She said to him, "Get off these stairs. I told you [you're] not supposed to be on these stairs, you f*****g punk; you're not going to turn this into a ghetto." Marlene then pulled out the cord that ran from Lemons' radio to the electrical outlet. Lemons, upset, remained seated and did not respond. Marlene then said, "You f*****g punk; you f*****g loser" and entered the apartment building.

20. In about September 2005, Lemons and Williams heard raised voices in the hallway outside their apartment. Opening their apartment door to investigate, they saw Marlene O'Neill and an African-American tenant, Janice Skinner, arguing. Marlene cursed at Skinner, called her the N-word several times, and accused her of being a drug addict "crackhead." Marlene then turned to Lemons and Williams, cursing at them and saying, "Get back into your apartment." She then said to Lemons, "What do you want?" and "You want to see?" lifting her shirt and showing her bra. Williams, who was pregnant at the time, felt offended and upset by Marlene's conduct. She pulled Lemons back into their apartment. Lemons was also upset, and could not understand why Marlene acted so hostile and aggressively toward him.

21. Another African-American tenant, Audra Robinson, witnessed the verbal confrontation involving Marlene O'Neill, Skinner and Lemons. Robinson was shocked and offended to hear Marlene O'Neill use the N-word.

22. On September 22, 2005, complainant Chanel Williams wrote a letter addressed to "Landlord," itemizing repairs needed in their apartment. They did not receive any response.

23. One day in early November 2005, Lemons arrived home to encounter Marlene O'Neill in the midst of a confrontation with Janice Skinner in the hallway of the apartment building. Maureen O'Neill was also present. Maureen ordered Lemons to go into his apartment and Lemons responded calmly that he did not have to go back into his apartment. Maureen then said, "What's wrong with you people?" She repeated the remark, "What's wrong with you people," not addressing either Lemons or Skinner by name. Lemons understood the term "you people" to be a derogatory reference to Black people—in his view, "just a nice way of saying the N-word." A few minutes later, after Skinner called the police, she and Lemons sat outside waiting for them to arrive. Marlene O'Neill approached them, saying "You punk; you guys." Neither Skinner nor Lemons responded. Marlene said, "You do-rag [N-words]" and walked back into the apartment building.

24. Lemons was extremely stressed and upset at being called the N-word. In the days that followed, he tried to avoid any interaction with Marlene O'Neill. He talked to his wife

Chanel Williams about what they should do. He also told a neighbor, tenant Eleanor Cody, that Marlene had confronted him about being on the porch and called him the “N-word.”

25. In the first week of November 2005, about a week after their daughter Talia was born, Lemons and Williams were cooking dinner, when they heard a crash at their front door. Thinking someone had kicked the door, Lemons went into the hallway, where he saw Marlene O’Neill. When he asked her what happened, Marlene told him, “I’m going to get you guys out of here.” Williams, who overheard the comment, tried to calm Lemons down. He was angry and upset.

26. In about November 2005, Lemons telephoned Sentinel Fair Housing to complain about complainants’ housing situation and Marlene O’Neill’s conduct.

27. As a result of Marlene O’Neill’s conduct, complainants Lemons and Williams decided they had to move their family out of Maryland Apartments. Consequently, they decided not to pay their rent, but to save for a deposit so that they could move to a new apartment.

28. On November 21, 2005, Maureen O’Neill issued a Three Day Notice to Pay Rent or Quit (Three Day Notice) to complainants. A day or two later, Maureen knocked on complainants’ apartment door, saying that she was there to collect the rent. Complainant Williams told Maureen that she had no problem paying the rent, but had a problem with Marlene’s harassing Lemons and making racial remarks, as well as the long-standing repairs needed in their apartment.

29. On December 1, 2005, complainants wrote a letter to “Owner, Maureen O’Neill,” in which they gave 30 days’ notice to vacate, stating that the reason they were moving was because of the “ongoing harassment” by Marlene. They went on to say:

... We feel you have [failed] to handle or respond to these matters of discrimination, racial comments, accusing of stealing out of others apartments, exposing her body to us and about a week ago she kick[ed] our front door. This has been unpeaceful living for the past 5-6 months, which we should be entitled to peaceful living in our apartment. You also [failed] to respond to our complaints to Sentinel Fair Housing about these problems...

30. Marlene O’Neill’s conduct toward Lemons and Williams affected their self esteem. As a young family, they had made their best efforts to be conscientious tenants and “do things the right way.” They felt as if respondents were “putting [them] down” because they were African-Americans. Lemons also felt diminished as a man, wanting to defend himself against Marlene’s attacks, but feeling that he could not do so. They both felt that they had no option other than to try and avoid Marlene as much as possible and ultimately, to move out of their apartment.

31. On January 14, 2006, complainants moved to a two-bedroom apartment located at 520 Van Buren, Oakland. The monthly rent at 520 Van Buren was \$1,295 per month.

32. On June 20, 2006, complainants moved to 941 Center Street, Oakland, where they paid \$1,100 per month in rent.

33. Complainant Williams missed two days of work to attend the hearing in this matter, for lost wages of \$120. Complainants paid \$10.60 for public transport and \$12 in parking to attend the hearing.

Official Notice

34. John O'Neill died on August 23, 2007, prior to the commencement of the hearing in this matter. The DFEH introduced the Certificate of Death issued by the City and County of San Francisco, properly subject of official notice, under California Code of Regulations, title 2, section 7431.

35. During the proceedings on this matter, official notice was taken of the records of the Superior Court of California, County of Alameda, in Dept. Fair Empl. & Hous. v. Maureen O'Neill, case number RG 07-308666. (Cal. Code Regs., tit. 2, § 7431.) These records reflect the DFEH's Petition to Compel Compliance with Investigative Discovery, supporting documentation, the Notice of Partial Compliance and the Dismissal of the Petition to Compel entered by the Superior Court.⁵

DETERMINATION OF ISSUES

Timeliness of the DFEH's Accusation

The DFEH's accusation in this case was filed with the Commission on June 21, 2007, more than one year after the filing of the complaint. The DFEH asserts that the accusation was timely because the deadline to file was tolled during the pendency of its Petition to Compel, under Government Code section 12963.5, subdivision (f). Respondents argue that

⁵ On March 6, 2008, after the hearing in this matter, respondents submitted a Motion to Supplement the Record by declarations signed by two declarants, Maureen O'Neill and Maritza Perez. The DFEH timely filed its Opposition to respondents' Motion. On March 24, 2008, the matter came on for telephonic hearing before the undersigned administrative law judge.

In an Order dated March 28, 2008, respondents' Motion to Supplement the Record was denied, on the grounds that respondents did not demonstrate sufficient good cause—both declarants attended the hearing in this matter and there was no showing that they could not have testified at hearing to the matters set out in the supplemental declarations. Further, admission of the proffered declarations would deprive the DFEH of its right to cross-examination. (Cal. Code Regs., tit. 2, § 7429, subd. (f)(2).)

that any applicable tolling applied only to Maureen O'Neill, not to respondents Marlene or John O'Neill, since they were not parties to the discovery dispute.

Government Code section 12963.5, subdivision (f), provides:

The period of time within which the department is directed to file an accusation by section 12965 shall be extended by the length of the period between the filing of a petition under this section and either (1) the final effective date, after the exhaustion of any challenges to the original order in higher courts, of an order of the superior court denying the petition, or (2) the filing by the department of a certified statement...indicating the respondent's compliance with the order of the superior court granting the petition in whole or in part, whichever occurs later.⁶

Here the DFEH filed its Petition to Compel on January 29, 2007, and the Statement of Partial Compliance on May 23, 2007, a tolling period of 114 days. The DFEH issued and filed the accusation on June 21, 2007, which is one year plus 110 days after the filing of the complaint. Thus, the accusation was issued within the tolling period provided by Government Code section 12963.5, subdivision (f).

Respondents concede that the accusation was timely against Maureen O'Neill, but argue that the tolling does not apply to the rest of the respondents, since neither Marlene nor John O'Neill were served with the Subpoena Duces Tecum or Petition to Compel, and therefore it would not be "logical or just" to apply the extension of time to them. The DFEH argues, however, that the plain statutory language of Government Code section 12963.5, subdivision (f), compels the conclusion that the tolling provision applies to the entirety of the accusation, and thus against all respondents. The DFEH further argues that to interpret subdivision (f) in the fashion urged by respondents would impede the Department's key function of "making a fully informed *neutral* decision on the merits of a discrimination complaint." (Emphasis in original.)

The plain language of Government Code section 12963.5, subdivision (f), applies the statutory extension to the DFEH's time for filing "an accusation." Thus, as the DFEH correctly points out, subdivision (f), on its face, does not limit the scope of its tolling effect to apply only to the specific person or individual against whom a petition to compel has been filed. Moreover, in this case, where all the O'Neill respondents were co-owners of the subject housing accommodation, Maureen O'Neill's action in not complying with the investigative discovery by providing the information and documents sought by the DFEH in a timely manner should not shield the remaining respondents from liability. If the interpretation of subdivision (f) urged by respondents were to be given effect, a recalcitrant respondent could thwart a DFEH investigation by refusing to turn over key discovery

⁶ The procedural rules set forth in section 12965 apply to accusations alleging discrimination in housing. (Gov. Code, § 12981, subd. (a).)

information and “run out” the one-year statute of limitations deadline. This in turn could either force the DFEH to proceed with issuance of an accusation against other respondents without key investigative discovery, or require that the Department decline to issue an accusation for lack of evidence. That position is fundamentally inconsistent with the broad remedial scheme of the FEHA (Gov. Code, §§ 12920; 12921, subd. (b)) and at odds with the plain language of the statute. (Gov. Code, § 12065, subd. (f).)

Accordingly, this decision finds that the accusation in this case was timely filed against respondents under Government Code section 12963.5, subdivision (f).⁷

Liability

The DFEH asserts that respondents’ conduct toward complainants constituted discriminatory treatment and statements of preference based on race, in violation of Government Code section 12955, subdivisions (a), and (c). The accusation also alleges that respondents violated Government Code sections 12955, subdivision (f), by retaliating against complainants, and 12955.7, by interfering with their right to discrimination-free housing, as well as Civil Code section 51, as incorporated into FEHA at Government Code sections 12948 and 12955, subdivision (d).

Respondents deny any and all acts of discrimination, racial statements, retaliation or related charges, asserting that they should not be held liable under the Act. Respondents assert that complainants’ allegations in this case were fomented by Janice Skinner, a problem tenant, who influenced Lemons to file a complaint.

⁷ In their post-hearing written brief, respondents raise the issue of timeliness of service of the complaint and accusation on Marlene O’Neill. This decision finds that Marlene O’Neill, who testified at hearing that she had resided in Florida for the past two years, voluntarily submitted herself to the jurisdiction of the Commission by appearing at hearing in this matter.

Respondents also object that the DFEH did not serve all respondents with a “100-day letter,” indicating that completion of the investigation within 100 days was impracticable, as provided at Government Code section 12980, subdivision (f). Respondents point out that the only 100-day letter in the record was sent by the DFEH to complainants and respondent Maureen O’Neill.

Under analogous federal authority, a procedural shortcoming such as not serving all respondents with the 100-day letter is generally viewed as a technical defect, and not as jurisdictionally fatal. (See *Baumgardner v. HUD* (6th Cir. 1992) 960 F.2d 572; *Kelly v. HUD* (1993) 3 F.3d 951; cf. *HUD v. Sparks* (HUD Secretary 2003) 2003 WL 686070 (H.U.D.A.L.J.)). Here, respondents failed to demonstrate any prejudice resulting from their not being copied on the 100-day letter. As noted above, Marlene O’Neill was out of state, and the record indicated that both Marlene and John O’Neill at times used the same mailing address as Maureen O’Neill, to whom the 100-day letter was addressed. Accordingly, the failure to serve all respondents with the 100-day letter does not warrant dismissal of this action.

This decision, however, will not reach the potential liability of the Estate of John O’Neill, since there was no showing that any representative of the Estate of John O’Neill waived the time limitations for hearing. (Gov. Code, § 12968.)

Government Code section 12955, subdivision (a), provides in pertinent part that an owner of any housing accommodation is prohibited from discriminating against any person because of his or her race, color or national origin. (Gov. Code, § 12955, subd. (a).) Discrimination under Government Code section 12955, subdivision (a), is established if a preponderance of the evidence demonstrates that a complainant's protected status was a motivating factor in committing an unlawful housing practice, even if other factors may have also motivated the practice. (Gov. Code, § 12955.8, subd. (a); *Dept. Fair Empl & Hous. v. Kokado* (1995) No. 95-05, FEHC Precedential Decs. 1994-95, CEB 3, p. 9 [1995 WL 908702 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Davis Realty Co.* (1987) No. 87-02, FEHC Precedential Decs. 1986-1987, CEB 5, p. 18 [1987 WL 114850 (Cal.F.E.H.C.)].) Intent to discriminate may be established by direct or circumstantial evidence. (Gov. Code, § 12927, subd. (c)(1).)

Government Code section 12955, subdivision (c), provides that it is unlawful for a person to make any statement with respect to the rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race or other protected status.

At hearing, complainant Lemons testified that Marlene O'Neill used the N-word toward him, and to another African-American tenant, Janice Skinner, on more than one occasion. Complainant Chanel Williams testified that she also heard Marlene O'Neill use the N-word during the altercation in the hallway.

Complainant Lemons also testified that Marlene O'Neill angrily accused him of "turning [the apartments] into a ghetto," when she ordered him off the front porch, also calling him a "f*****g punk" and a "f*****g loser." Lemons further testified to Marlene O'Neill accusing him of stealing, banging on his door and shouting in the process, and referring to Lemons and Janice Skinner as "do-rag [N-word]s."

In her testimony at hearing, respondent Marlene O'Neill, while acknowledging some heated confrontations between her and Janice Skinner, emphatically denied ever using the N-word to either complainant Lemons or Skinner. Marlene testified that she believed that Lemons had been influenced by Skinner, who was an agitator and drug dealer, according to respondents. Skinner was not called as a witness at hearing. Marlene O'Neill, while conceding that she had ordered complainant Lemons not to sit on the porch, and had pulled the electrical cord to his radio, testified that she did not call Lemons names or at any time mistreat him.⁸

Respondents' denials are contradicted however, not only by complainants' testimony, but also by that of DFEH witnesses Audra Robinson and Eleanor Cody. Both Robinson and Cody were tenants at Maryland Apartments, who testified at hearing corroborating

⁸ At hearing, faced with examination on the subject by the Department, Marlene O'Neill candidly discussed her 14-year battle with alcoholism and completion of a rehabilitation program in Florida. This decision does not find Marlene O'Neill's alcoholism probative on the issue of whether she made the discriminatory statements attributed to her.

complainant Lemons' version of events in varying respects. Robinson testified that she witnessed Marlene O'Neill using the N-word in the hallway altercation with Janice Skinner. Eleanor Cody testified that Lemons recounted interactions with Marlene O'Neill to her, including her use of the N-word. Although respondent posits that these witnesses were "angry women," this decision finds that, based on their demeanor and manner of testimony, and the fact that they have no stake in these proceedings, they were credible witnesses.⁹

Accordingly, the DFEH established that Marlene O'Neill made the statements as testified by complainants. These statements are direct evidence of both racial animus motivated by Lemons' being African-American and discriminatory statements of preference. Maureen O'Neill's calling complainants "You people" can also be seen as racially motivated, and was indeed perceived as such by complainants. Based on this record, the DFEH established a violation of Government Code section 12955, subdivision (c).

The DFEH accusation alleges that, as a result of respondents' conduct, complainants Lemons and Williams and their two daughters were constructively evicted from their home at Maryland Apartments.

Under the Act, constructive eviction is established where respondents' discriminatory acts and statements in violation of the FEHA materially interfere with complainants' use and enjoyment of their housing accommodation, causing them to elect to move out. (See *HUD v. Williams*, 2 Fair Housing-Fair Lending Rptr. ¶ 25,007 (HUD Secretary 1991; 1991 WL 442796 at * 14)(H.U.D.A.L.J.) holding that, "[a] disturbance of a tenant's possession by a landlord, or by someone acting under the landlord's authority, which deprives a tenant of the beneficial enjoyment of the premises, causing him to abandon it, amounts to constructive eviction, provided the tenant abandons the premises within a reasonable time;" *HUD v. Holiday Manor Estates Club*, 2 Fair Housing-Fair Lending Rptr. ¶ 25,016 at p. 25,229 (HUD Secretary 1992; 1991 WL 442792 at * 15))(H.U.D.A.L.J.), both citing Am. Jur.2d Landlord and Tenant, Sec. 301 at 316 (1970); cf. *Honce v. Vigil* (1993) 1 Fed.3d 1085, 1091.)¹⁰

Here, the record established that, as a direct result of respondents' discriminatory conduct and racially-motivated statements, complainants were forced to move out of their home at Maryland Apartments. This constructive eviction constitutes a "denial or

⁹ This decision does not rely on the testimony of DFEH witnesses Mark Hollum or Carla Poe, since Poe testified that they moved out of Maryland Apartments prior to any of the incidents alleged in the accusation.

¹⁰ Given that the FEHA statutory language governing housing discrimination is nearly identical to the federal Fair Housing Amendments Act (see 42 U.S.C. §§ 3604), and because Government Code section 12955.6 requires that the FEHA not be "construed to afford to the classes protected ... fewer rights or remedies than the federal Fair Housing Amendments Act of 1988," precedent analyzing housing discrimination prohibited under the FHAA applies in determining whether a respondent has violated the FEHA. (See Gov. Code, § 12955.6.)

As the California Supreme Court noted in *Green v. Sup. Ct.* (1974) 10 Cal.3d 616, 624, 635, the doctrine of constructive eviction "expanded the traditional 'covenant of quiet enjoyment' from simply a guarantee of the tenant's possession of the premises [citations] to a protection of his 'beneficial enjoyment' of the premises...."

withholding of housing accommodations” under the Act. (Gov. Code, § 12927, subd. (c)(1).) Accordingly, the DFEH established that complainants were subjected to discrimination, in violation of Government Code section 12955, subdivision (a).

As the evidence established that Marlene O’Neill was the manager of Maryland Apartments, as well as an owner, her unlawful conduct in violation of the Act is imputed to her co-respondents Maureen O’Neill and the O’Neill Family Trust. (See *Dept. Fair Empl. & Hous. v. River Meadow Trailer Park* (Oct. 7, 1998) No. 98-15, FEHC Precedential Decs. 1998, CEB 3, pp. 24-26 [1998 WL 916484 (Cal.F.E.H.C.)].)

Accordingly, the DFEH established that respondents are liable for violation of Government Code section 12955, subdivisions (a) and (c).¹¹

C. Government Code section 12955, subdivision (f)

The DFEH also asserts that respondents are liable for violating Government Code section 12955, subdivision (f), which protects a complainant from retaliation for opposing practices unlawful under the FEHA.

While respondents served complainants with a Three Day Notice on November 21, 2005, the Notice was served several days prior to Williams’ complaint to Maureen O’Neill about Marlene O’Neill’s conduct, and was in direct response to complainants’ failure to pay the rent due on November 1. On this record, there is an insufficient showing to find that respondents served the Three Day Notice in retaliation against for complainants for exercising their rights under the Act. (*Dept. Fair Empl. & Hous. v. McWay Family Trust* (Oct. 2, 1996) No. 96-07, FEHC Precedential Decs. 1996, CEB 1, pp. 23-24 [1996 WL 774922 (Cal.F.E.H.C.)].)

Thus, this decision does not find a violation of Government Code section 12955, subdivision (f).

D. Government Code section 12955.7

The DFEH asserts that respondents interfered with complainants’ right to be free from race discrimination, in violation of Government Code section 12955.7. Section 12955.7 makes it unlawful “to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of

¹¹ The DFEH also alleges an additional violation of Government Code Section 12955, subdivision (d), which makes discrimination unlawful for any person subject to the provisions of Civil Code section 51. Having already found liability under section 12955, subdivisions (a) and (c), this decision does not need to reach the section 12955, subdivision (d), allegation.

that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by Section 12955 or 12955.1.”

Respondent Marlene O’Neill, by her racial remarks about ghettos, do-rags, and her use of the N-word, and by accusing Lemons of stealing, by banging on and slamming complainants’ door, and by threatening “I’m going to get you guys out of here,” interfered with complainants’ exercise and enjoyment of their tenancy and deprived them of their right to a discrimination-free housing environment at Maryland Apartments. Also, respondent Maureen O’Neill’s objectifying use of the term “You people” toward Black tenants, while ordering them out of the hallway and into their own apartment, interfered with the exercise and enjoyment of complainants’ tenancy.

Accordingly, the DFEH established that respondents violated Government Code section 12955.7.

Remedies

The DFEH in its accusation seeks recovery of complainants’ out-of-pocket expenses, compensatory damages for emotional distress for complainants, and the imposition of a civil penalty. In addition, the Department asks for affirmative relief in the form of training and the development and dissemination of a fair housing policy.

A. Out-of-Pocket Expenses

The DFEH seeks recovery of complainants’ out-of-pocket expenses for the difference between the rental amount they paid at Maryland Apartments, and at their new apartment located at 520 Van Buren, then at 941 Center Street, both in Oakland.¹² Because the record indicated that the new apartments were two-bedroom, while complainants’ Maryland Apartment unit was one-bedroom, the differential is adjusted by \$275 per month, representing the increase in rent for a two-bedroom unit at Maryland Apartments.

That differential is calculated from January 14, 2006, when complainants moved out of Maryland Apartments, until June 20, 2006, when they moved again to a lower-priced apartment. This is a period of 5.2 months, for which the differential is calculated by subtracting \$725 plus \$275 from \$1,295, times 5.2, for the sum of \$1,534. After complainants moved to Center Street up until date of hearing, the differential is calculated by subtracting \$725 plus \$275 from \$1,100, for a period of 19 months, for the sum of \$1,900.

¹² In closing argument at hearing, the DFEH also asked that complainants be relieved of any claim for past-due rent from respondents. Under California law, a tenant who has been constructively evicted may claim an offset in an action brought by the landlord for unpaid rent. (See *Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 847; citing *Green v. Sup. Ct.*, *supra*, 10 Cal.3d at pp. 624, 635; *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 590.) That matter is appropriately resolved in the forum where the landlord has filed the claim for unpaid rent.

The evidence also showed that complainants incurred \$120 for Williams' lost wages and also incurred \$22.60 in other costs of transportation and parking charges to attend the hearing. Complainants are entitled to reimbursement of these out-of-pocket costs as reasonably necessary to the conduct of this litigation.

Accordingly, respondents will be ordered, jointly and severally, to pay complainants their out-of-pocket damages in the sum of \$3,576.60, plus interest thereon at the legal rate, until paid.

B. Compensatory Damages for Emotional Distress

The DFEH requests that the Commission order respondents to pay actual damages to compensate complainants for the emotional distress they suffered as a result of respondents' discrimination.

Complainant Lemons' credible testimony at hearing established that he suffered significant frustration, anger, and emotional distress as a direct result of respondent Marlene O'Neill's conduct. He testified that, in dealing with Marlene O'Neill, he tried hard to handle the matter the "right way," never reacting by "lash[ing] out."

The record established that Lemons recounted Marlene O'Neill's conduct to his wife Chanel Williams. Williams tried to calm him down, recognizing his need to vent, and his frustration. Williams told him to try to "let it go, try to avoid her." Williams saw that Lemons felt "less of a man" under Marlene's verbal attacks on him and his race.

Williams credibly testified that she also felt demeaned by Marlene's name-calling and racial epithets. She testified that she believed that her family was under attack and that they were being "put down" by respondents because they were African-Americans. Her self-esteem suffered. When she was at her apartment, Williams stayed inside, not wanting to venture out, not communicating with anyone in the apartments.

Marlene O'Neill's continuing conduct and use of racial epithets, calling Lemons the N-word, and "do-rag N-Word," and banging and kicking on their door, ultimately led complainants to the realization that they had to leave their apartment and find a new place to live. Once they moved, the lingering emotional effects of the treatment they had received at Maryland Apartments continued to affect them in their daily lives, for over a year. The effects of that emotional distress were still apparent at hearing.

Considering the facts of this case, respondents will be ordered, jointly and severally, to pay complainant Dante Lemons the sum of \$15,000¹³ and complainant Chanel Williams \$7,500 in damages for their respective emotional distress, plus interest thereon at the legal

¹³ This decision recognizes that a portion of complainant Lemons' ongoing stress resulted from his injuries in the automobile accident in December 2004 and resulting medical leave for a significant period during 2005. That emotional distress is not imputable to respondents and not part of the calculation of Lemons' actual damages.

rate from the effective date of this decision until the date of payment. (*Dept. Fair Empl. & Hous. v. Merribrook Apartments* (1988) No. 88-19, FEHC Precedential Decs., 1988-1989, CEB 7, p. 22.)

C. Civil Penalty

The DFEH alleges in its accusation that respondents should be ordered to pay to complainants a civil penalty, asserting that respondents' conduct was particularly deliberate and egregious, revealing oppression and malice.

To vindicate the public interest, Government Code section 12987, subdivision (a)(3), authorizes the Commission to order a respondent to pay a civil penalty of up to \$10,000 for a first violation of the Act.

Here respondent Marlene O'Neill's conduct in using racial epithets and derogatory remarks, constructively evicting complainants from their home at Maryland Apartments, was an unconscionable abrogation of her duties as an owner and manager of a housing accommodation under the Act. Moreover, Maureen O'Neill's failure to address complainants' concerns, and to take immediate steps to address them, was egregious, after they not only complained to her in person in November 2005 but also wrote her a detailed complaint in December 2005. Respondents' conduct led to complainants' racially-motivated constructive eviction from their home.

Accordingly, a civil penalty is appropriate in this case. Respondents will be ordered, jointly and severally, to pay a civil penalty in the sum of \$5,000, jointly to complainants, plus interest thereon at the legal rate, until paid.

D. Affirmative Relief

The DFEH asks that respondents be ordered to develop, implement and post a policy against discrimination based on race, and circulate this policy to all apartment residents and applicants. The DFEH further asks that respondents undergo training regarding race discrimination.

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12987, subd. (a)(2).)

Respondents Maureen O'Neill and the O'Neill Family Trust shall be ordered to develop an anti-discrimination policy, distribute copies of that policy to its tenants, applicants, and managers, and post notices in the forms attached to this decision as Attachments A and B. Respondents Maureen O'Neill and a designated representative of the O'Neill Family Trust, and Marlene O'Neill if she returns to the State of California, shall also

be ordered to attend anti-discrimination training, at their own expense.

ORDER

1. The accusation against the Estate of John O'Neill is dismissed.
2. Respondents Marlene O'Neill, Maureen O'Neill and the O'Neill Family Trust shall immediately cease and desist from discriminating against tenants on the basis of race.
3. Within 60 days of the effective date of this decision, respondents Marlene O'Neill, Maureen O'Neill and the O'Neill Family Trust shall, jointly and severally, pay to complainants Dante Lemons and Chanel Williams their out of pocket damages in the amount of \$3,576.60, plus interest thereon at the legal rate, accruing from the effective date of this decision to the date of payment.
4. Within 60 days of the effective date of this decision, respondents Marlene O'Neill, Maureen O'Neill and the O'Neill Family Trust shall, jointly and severally, pay to complainant Dante Lemons the amount of \$15,000 in emotional distress damages, plus interest thereon at the legal rate, accruing from the effective date of this decision to the date of payment.
5. Within 60 days of the effective date of this decision, respondents Marlene O'Neill, Maureen O'Neill and respondent O'Neill Family Trust shall, jointly and severally, pay to complainant Chanel Williams the amount of \$7,500 in emotional distress damages, plus interest thereon at the legal rate, accruing from the effective date of this decision to the date of payment.
6. Within 60 days of the effective date of this decision, respondents Marlene O'Neill, Maureen O'Neill and the O'Neill Family Trust, shall jointly and severally, pay to complainants Dante Lemons and Chanel Williams a civil penalty in the amount of \$5,000, together with interest thereon at the legal rate, accruing from the effective date of this decision to the date of payment.
7. Within 60 days of the effective date of this decision, Maureen O'Neill, a designated representative of the O'Neill Family Trust and the managers at the Maryland Apartments shall, at respondents' expense, attend a training program about race-based housing discrimination, and the procedures and remedies available under the Fair Employment and Housing Act.
8. Within 10 days of the effective date of this decision, respondent Maureen O'Neill and an authorized representative of respondent O'Neill Family Trust shall complete, sign and post clear and legible copies of the notices conforming to Attachments A and B. These

notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

9. Within 100 days after the effective date of this decision, respondents shall in writing notify the Department of Fair Employment and Housing and the Commission of the nature of their compliance with sections two through eight of this order.

10. In the event respondent Marlene O'Neill returns to reside in California and is an owner or manager of a housing accommodation, she shall, at her own expense, attend a training program about race-based housing discrimination, and the procedures and remedies available under the Fair Employment and Housing Act, and shall in writing notify the Department of Fair Employment and Housing and the Commission of the nature of her compliance with this section.

11. Complainants shall in writing waive any rights or claims they may have under Civil Code section 52 based on the events described in this decision. The Department shall serve copies of the waiver on respondents and the Commission.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code sections 11523 and 12897.1, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondents and complainants.

DATED: June 11, 2008

CAROLINE L. HUNT
Administrative Law Judge

ATTACHMENT A

**NOTICE TO APPLICANTS, TENANTS AND UNIT OWNERS
AT MARYLAND APARTMENTS**

After a full hearing, the California Fair Employment and Housing Commission has determined that Marlene O'Neill, Maureen O'Neill and the O'Neill Family Trust, owners of the Maryland Apartments, violated the California Fair Employment and Housing Act by discriminating against persons on the basis of race. (*Dept. Fair Empl. & Hous. v. O'Neill Family Trust* (2008) FEHC Dec. No. ____.) As a result of this finding, the Commission has ordered Maureen O'Neill and an authorized representative of O'Neill Family Trust to distribute this Notice and to:

- 1) Cease and desist from discriminating against persons on the basis of race;
- 2) Pay to the complainants damages for out-of-pocket costs, emotional injury and a civil penalty; and
- 3) Undergo training about pertinent housing discrimination laws and implement a written policy against housing discrimination.

Dated: _____

By: _____
Maureen O'Neill, Owner
Maryland Apartments

and

Dated: _____

By: _____
Authorized Representative of
O'Neill Family Trust, Owner
Maryland Apartments

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL BE POSTED FOR 90 DAYS FROM THE DATE LISTED ABOVE AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

NOTICE TO RESIDENTS, APPLICANTS OR TENANTS OF MARYLAND APARTMENTS

YOUR RIGHTS AND REMEDIES UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

YOU HAVE THE RIGHT TO BE FREE FROM UNLAWFUL HOUSING DISCRIMINATION.

The California Fair Employment and Housing Act prohibits discrimination in housing. It is unlawful for an owner or the owner's manager or agent to:

- Deny you housing or tell you housing is unavailable because of your race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, physical or mental disability, source of income or because you have children.
- Ask you (either orally or in writing) to identify your race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, or whether you have a physical or mental disability. Inquiries about your level or source of income are not unlawful.
- Make any statement, whether oral or written, that indicates a preference or limitation based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, disability status, source of income, or families with children.
- Establish any policy which provides inferior terms and conditions of housing to any particular race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, disability status, or families with children.

YOU HAVE THE RIGHT TO COMPLAIN ABOUT UNLAWFUL HOUSING DISCRIMINATION AND TO GET RELIEF.

The California Department of Fair Employment and Housing investigates and prosecutes complaints of housing discrimination. If you feel that any of these unlawful practices have happened to you, or that you have been retaliated against because you opposed these practices, you have one year to file a complaint with the state Department of Fair Employment and Housing at:

Department of Fair Employment and Housing – Housing Unit
1515 Clay Street, Suite 701
Oakland, CA 94612-2512
1-800-233-3212

ATTACHMENT B

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The Department of Fair Employment and Housing will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department may prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and require the property owner to pay money damages, a civil penalty, and give other appropriate relief. You may also elect to have the Department represent you in court, or you may retain your own attorney to take your case to court.

Dated: _____ By: _____
Maureen O'Neill, Owner
Maryland Apartments

and

Dated: _____ By: _____
Authorized Representative of
O'Neill Family Trust, Owner
Maryland Apartments

THE FAIR EMPLOYMENT AND HOUSING COMMISSION REQUIRES THAT THIS NOTICE BE POSTED UNDER PENALTY OF LAW. IT SHALL BE POSTED PERMANENTLY AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.